Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Commission's	)	**MM Docket No. 95-92**
Regulations Governing	)	
Programming Practices of	)	
Broadcast Television	)	
Networks and Affiliates	)	

TO: The Commission

COMMENTS OF AFLAC BROADCAST GROUP, INC.

AFLAC Broadcast Group, Inc. ("AFLAC")[1/], by its counsel, hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter. MM Docket No. 95-92, FCC 95-254 (released June 15, 1995). For the reasons set forth below, AFLAC opposes any changes in the "right to reject" rule.[2/] In particular, AFLAC opposes the Commission's proposal to narrow the scope of the rule to exclude affiliate rejection of network programming for purely financial reasons. As set forth below, the amended rule proposed by the Commission would be extremely difficult to administer and would significantly impair the ability of local television

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1/ Through its affiliated entities, AFLAC owns and controls the following network-affiliated television stations: WAFB(TV) (CBS), Baton Rouge, Louisiana; WTVM (ABC), Columbus, Georgia; WTOC-TV (CBS), Savannah, Georgia; WAFF(TV) (NBC), Huntsville, Alabama; WITN-TV (NBC), Washington, North Carolina; KFVS-TV (CBS), Cape Girardeau, Missouri; and KWWL(TV) (NBC), Waterloo, Iowa.

2/ That rule now guarantees to network affiliated television stations the right to reject network programming which the station "reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest" or to substitute a program that the station believes to be of "greater local or national importance." See 47 C.F.R. § 73.658(e) (1993).

stations to make programming decisions free of network interference.

BACKGROUND

The regulatory changes proposed by the Commission in this proceeding should not be considered in a vacuum. Rather, they should be evaluated against the background of other statutory and regulatory changes now being contemplated by Congress and the Commission, the cumulative effect of which will be to concentrate control over local programming in the hands of the national television networks.[3/]

The current trend toward vertically integrated combinations of networks and studios, such as the proposed Disney/Capitol Cities merger, provides a further basis for concern. Even without the various statutory and regulatory changes discussed above, such networks will have considerably more economic power vis-a-vis local stations than the traditional networks with which the Commission is familiar, because they will control not only distribution but programming as well.

One of the driving forces behind such combinations is the desire to secure a distribution chain for programming and to provide a reliable supply of network owned programming to distribute. In such circumstances, the pressure on local

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3/ See Consolidated Comments of AFLAC Broadcast Group, Inc. in MM Docket Nos. 91-221, 87-8, 94-150, 92-51, 87-154 (filed May 17, 1995) (broadcast ownership and attribution); Comments of AFLAC Broadcast Group, Inc. in MM Docket 95-40 (filed June 13, 1995) (filing of network affiliation agreements); Comments of AFLAC Broadcast Group, Inc. in MM Docket 95-90 (filed August 28, 1995) (network advertising).

stations to "clear" network programming will increase even further from the already high levels that exist at the present time. In view of this trend toward concentration of economic power and control in the hands of a few vertically integrated networks, it is extremely important to move very cautiously when considering the modification or removal of current regulatory protections for the programming decisions of local stations.[4/]

This is especially true with respect to changes in the "right to reject" rule, which is at the very core of the Commission's network/affiliate rules. Indeed, as set forth below, AFLAC believes that the change proposed by the Commission would further accelerate the already dangerous trend toward concentrating control over programming in the hands of the networks.

4/ In addition, as stated in AFLAC's June 5, 1995 letter to the Commission, AFLAC believes that the network/affiliate rules should not be considered in the piecemeal fashion proposed by the Commission. Instead, because of their interrelationship and the cumulative impact that changes in individual network/affiliate rules could have on the overall relationship between networks and affiliates (and, therefore, on the interests of the viewing public), AFLAC believes that an omnibus proceeding addressing all of the proposed changes in the network/affiliate rules would be far preferable. In that way, commenting parties and the Commission address the proposed changes in a comprehensive manner. Although the Commission has decided not to formally consolidate its various proceedings concerning the network/affiliate rules, the fact remains that the subject matter of these proceedings is inextricably intertwined. Accordingly, AFLAC continues to believe that the Commission should not modify or eliminate individual network/affiliate rules via separate rulemaking proceedings, but should consider the impact of these possible policy and rule changes on the overall relationship and balance of power between the networks and their affiliated stations.

I. THE CHANGE IN THE "RIGHT TO REJECT" RULE PROPOSED BY THE COMMISSION WOULD SIGNIFICANTLY IMPAIR THE CONTROL NOW EXERCISED BY LOCAL STATIONS OVER THEIR BROADCAST PROGRAMMING AND SHOULD BE REJECTED.

AFLAC previously has expressed its concern that changes proposed by the Commission in several of its network/affiliate rules would impair the statutorily mandated control exercised by local television stations over programming aired on their stations. See, e.g., Comments of AFLAC Broadcast Group, Inc., MM Docket No. 95-90 (opposing proposed changes in the network rep and network advertising rates rules). AFLAC believes that the change in the "right to reject" rule proposed by the Commission would have precisely that effect. Accordingly, AFLAC opposes adoption of that proposal.

The Commission has suggested modifying the "right to reject" rule to clarify that the "rule may not be invoked based solely on financial considerations." NPRM at ¶ 25. Thus, under the Commission's proposal, "profit . . . must not be the sole motive behind preemption." Id. Although the Commission has tried to explain how its proposed change would be interpreted and applied,[5/] AFLAC submits that, in practice, the meaning of the rule would be extremely unclear and its application very uncertain. This ambiguity, which is inherent in the Commission's proposed modification, would create the opportunities for increased network influence over station programming decisions, thus inevitably eroding the fundamental purpose of the "right to

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5/ See NPRM at ¶ 25.

reject" rule -- to protect the programmatic discretion of individual, local broadcasters.

For example, AFLAC's station in Savannah, Georgia, WTOC-TV (a CBS affiliate) runs a weekly station-produced show from 11:30 p.m. to midnight each Friday during football season, featuring highlights from that evening's local high school football games. In order to carry this show, the station delays the start of David Letterman's show, which WTOC-TV obtains from CBS, for 30 minutes. CBS has brought considerable pressure to bear on WTOC-TV to clear the Letterman show live. Thus far, in part because of the protection provided by the Commission's "right to reject" rule, WTOC-TV has been able to resist those pressures.

There is no question but that WTOC-TV's show provides an important public benefit. The show is so popular with local high school students throughout WTOC-TV's service area that the station has been commended for helping to keep teenagers off the streets after the games -- they return to their homes after the games to watch the highlights on WTOC-TV.

There is also no question but that WTOC-TV is better off financially by broadcasting Letterman on a delayed basis than if WTOC-TV ran Letterman live and did not broadcast the local football highlights. The Letterman show draws less than half the size audience as the local football highlights (a 3 rating for Letterman versus a 9 rating for the football show). Moreover, since the football show is a local show, WTOC-TV has more

advertising time to sell than it would in an equivalent half hour of the Letterman Show.

If the proposed change to the "right to reject" rule is adopted, WTOC-TV's decision to preempt the network to carry its football highlights show will immediately become open to question and challenge by the network, as will any decision by any other local station to preempt network programming for more highly rated (and, therefore, more profitable) non-network programming. The network will argue, notwithstanding the station's articulation of the clear public interest benefits that flow from the other programming, that the motivation behind the preemption is purely economic. In a situation such as WTOC-TV's, where the non-network programming is more popular and where the station is financially benefited by carrying it, it will as a practical matter be extremely difficult to prove that the station's motivation was not "purely economic." Moreover, the proposed change in the rule will place the burden on the station to demonstrate that its preemption decision was made for permissible reasons. The effect of the Commission's proposed change thus will be to establish a presumption against preemption of network programming, except for news or public affairs programming.

In the Report on Chain Broadcasting, 66 (Docket 5060, May 1941) the Commission previously has observed that it would be contrary to the requirements of the Communications Act to place on individual stations, the responsibility to justify preemption of network programming:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer control of his station directly to the network. . . . He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. (Emphasis added.)

AFLAC submits that the proposed change in the "right to reject" rule would be completely inconsistent with the requirements of the Communications Act, which assigns to individual local broadcasters the right and the ultimate responsibility for the programming (both network and non-network) broadcast on that station.

Moreover, the proposed change in the "right to reject" rule will, as a practical matter, significantly reduce the occasions in which local network affiliates seek to preempt network programming -- for whatever reason. If a local affiliate knows that any decision it makes to preempt the network is subject to being second-guessed by the network on the ground that the decision was made for "purely economic" reasons, the station will be far less likely to preempt at all -- in order to avoid the inevitable challenges to its programming decisions. As the Commission noted at page 66 of its Chain Broadcasting Report:

> [If] the licensee is not allowed to reject a program unless he can prove to the satisfaction of the network that he can obtain a better program, his effort to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course.

In addition, the proposed change in the "right to reject" rule undoubtedly would require the expenditure of significant amounts of Commission resources in resolving the inevitable disagreements between networks and their affiliates as to the meaning and application of the rule. AFLAC submits that there already are too many such instances -- for example, the Commission's political broadcasting rules -- in which stations must regularly seek interpretations of ambiguous Commission rules in order to carry on with their regular business activities. AFLAC respectfully suggests that the Commission should think long and hard before creating more such instances that require the expenditure of its limited time and resources.

Finally, the resolution of such disputes as to whether a particular preemption decision was based on permissible motives inevitably would place the Commission and its staff in the position of reviewing station programming decisions -- a position which AFLAC submits would raise serious First Amendment concerns.

The difficulty of determining whether the preemption was done because of "permissible" or "impermissible" motives can be illustrated by another example. From time to time, the AFLAC stations, like most broadcasters, will overcommit on selling advertising time and, to solve the problem (which admittedly is of the station's own creation), will preempt the network and run a two-hour movie in order to create additional local advertising inventory. This practice is derogatorily referred to by the networks as "make good theater."

How will the Commission be able to distinguish this situation, which is done for the plainest of economic motives, from a situation where a local station preempts a network movie to which it objects because of taste or other public interest considerations and runs another movie which, in its judgment, would be more acceptable to its audience? The fact is that to an outside observer both decisions will appear to be the same -- because in both situations the station will have run a locally originated movie, thereby creating additional local inventory to sell -- although in the case of a "public interest" preemption, the creation of additional inventory will have been merely an incidental result and not the reason for the preemption. Thus, both situations will appear to have been undertaken for purely economic reasons, when in fact the station's motivation in the two situations will have been completely different.

Adoption of the change proposed by the Commission will make it far less likely that the second situation -- the "public interest" preemption -- will occur because the network will be able to argue that it was done for purely economic motives. And if the station nevertheless persists in such a preemption, the Commission will be compelled to inquire into the station's decisionmaking process in order to determine why it preempted the network. AFLAC submits that neither alternative is acceptable or consistent with the Commission's statutory or constitutional obligations.

CONCLUSION

AFLAC believes that the proposed modification of the "right to reject" rule is premature and unwise. The Commission should not consider any changes to its network/affiliate rules until the effect of other statutory and regulatory changes on the relative power of the networks and affiliates can be evaluated. In any event, the Commission's proposed revision to the "right to reject" rule should not be adopted. Amendment of the rule in the manner suggested by the Commission would effect a fundamental change in the relative balance of power between networks and their affiliates and would effectively place the burden on the affiliates to justify any decision to preempt network programming. Such a change is inconsistent with the provisions of the Communications Act, would require the expenditure of significant Commission resources to resolve disputes between networks and their affiliates, and would place the Commission in the constitutionally untenable position of reviewing individual station programming decisions.

Accordingly, AFLAC respectfully submits that the "right to reject" rule should be retained in its current form.

Respectfully submitted,

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